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Supreme Court, U.S.
FILED
FEB 21 2001
CLERK

No. 00-1292

In The

Supreme Court of the United States

ROBERT H. BARRETT,

Petitioner,

v.

BOROUGH OF CARLISLE,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. SHOULD THIS COURT DENY THE PETITION FOR CERTIORARI WHERE THE PETITIONER AGAIN ATTEMPTS TO RAISE PREVIOUSLY LITIGATED PROCEDURAL AND SUBSTANTIVE ISSUES RELATING TO THE CARLISLE BOROUGH HISTORIC DISTRICT WHICH ARE BARRED UNDER *RES JUDICATA*?

Suggested Answer: in the Affirmative.

2. SHOULD THIS COURT DENY THE PETITION FOR CERTIORARI WHERE THE PETITIONER COMPLAINS OF THE TRIAL COURT'S ENTRY OF A DEFAULT JUDGMENT AGAINST HIM AS A SANCTION FOR HIS FAILURE TO PROVIDE DISCOVERY UNDER STATE CIVIL PROCEDURAL RULES, WHERE NO FOURTH AMENDMENT QUESTION IS PRESENTED?

Suggested Answer: in the Affirmative.

3. SHOULD THIS COURT DENY THE PETITION FOR CERTIORARI WHERE A STATE TRIAL COURT ENTERS A DEFAULT JUDGMENT PROVIDING APPELLEE EQUITABLE RELIEF IN THE FORM OF THE APPOINTMENT OF A MANAGER TO BRING PETITIONER'S PROPERTIES INTO CODE AND HISTORIC DISTRICT COMPLIANCE WHILE HE RETAINS OWNERSHIP AND JOINT POSSESSION, WHERE THE RECORD FAILS TO ESTABLISH A FIFTH AMENDMENT TAKING, AND WHERE HE INTENTIONALLY FORFEITS HIS RIGHT TO PRESENT EVIDENCE OF SUCH CLAIM AT TRIAL?

Suggested Answer: in the Affirmative.

TABLE OF CONTENTS

Page

Counterstatement of Questions Presented i

Table of Contents..... ii

Table of Authorities iii

Reasons for Denying the Writ 1

Counterstatement of the Case..... 2

Argument 4

Conclusion 9

Appendix

1. Order of the Court of Common Pleas of Cumberland County, Pennsylvania at No. 98-4145 Equity Term, dated October 7, 1999, which held the Petitioner in Contempt of Court.....App. 1a

2. Order of the Court of Common Pleas of Cumberland County, Pennsylvania at No. 98-4145 Equity Term, dated November 22, 1999, imposing sanctions against the Petitioner for Failure to Comply with Discovery..... App. 2a

TABLE OF AUTHORITIES

Page

CASES

Barrett v. Borough of Carlisle, 707 A.2d 250 (Pa. Commw. 1998), *petition for allowance of appeal denied*, 555 Pa. 714, 724 A.2d 350 (1998).....3, 5

Dolan v. City Of Tigard, 512 U.S. 374, 129 L. Ed.2d 304 (1994).....8

Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 120 L. Ed.2d 798 (1992).....8

Nollan v. California Coastal Commission, 483 U.S. 825, 97 L. Ed.2d 677 (1987).....8

Park Home v. City of Williamsport, 545 Pa. 94, 680 A.2d 835 (1996).....6

Penn Central Transportation Company v. New York City, 438 U.S. 104, 57 L. Ed.2d 631 (1978).....5, 8

Pittsburgh v. Weinberg, 544 Pa. 286, 676 A.2d 207 (1996).....6

United Artists' Theater Circuit, Inc. v. City of Philadelphia, 535 Pa. 370, 635 A.2d 612 (1993).....5

RULES

Federal Rules of Civil Procedure No. 26, *et seq*.....7

Pennsylvania Rules of Civil Procedure No. 4001, *et seq*.....7

STATUTES

28 U.S.C. § 1257.....1

42 U.S.C. § 1983.....1, 4

REASONS FOR DENYING THE WRIT

The petition does not meet the jurisdictional requirements mandated by 28 U.S.C. § 1257. This is a state equity case brought by a municipality against a property owner to gain compliance with its property code and historic district regulations. It is not, as alleged by petitioner, an action brought under 42 U.S.C. § 1983.

Petitioner, Robert H. Barrett (herein, "Barrett"), attempts to challenge the procedural and substantive validity of historic district regulations enacted over twenty years ago by the Borough of Carlisle (herein, the "Borough"). (*See* Petitioner's Statement of Questions Presented, Nos. 1 and 2). He previously litigated these matters through the Pennsylvania judicial system and, having found no success, commenced to re-litigate them in the federal court system (*See* Petition for Writ of Certiorari filed in this Court at No. 00-977, and specifically, Petitioner's Appendix Parts D and F and Brief in Opposition Appendix Part 1 filed therein). He is barred under the long standing doctrine of *res judicata*.

Barrett also challenges the authority of a state court to require compliance with that state's discovery rules relating to interrogatories and document requests. He asserts, without authority, that such discovery amounts to an unlawful search and seizure under the Fourth Amendment. Adoption of this absurd proposition would render all discovery in civil cases in all state and federal courts unlawful.

Finally, he asserts, again without authority, that the entry of a default judgment against him as a sanction amounts to a constitutional taking of property rights. He

waived this issue in the trial court by stubbornly permitting the default judgment to be entered. Nevertheless, the appointment of a manager to oversee bringing his properties into compliance with a property maintenance code, while he retains full ownership and joint possession, is an equitable remedy which does not rise to the status of a receiver, a long established equitable remedy which lacks constitutional overtones. Petitioner provides no evidence that he is being deprived of all economically beneficial use of his property.

Barrett presents no compelling federal or constitutional issues deserving of this Court's consideration and his Petition should be denied.

COUNTERSTATEMENT OF THE CASE

Barrett petitions for Writ of Certiorari from the Order of the Supreme Court of Pennsylvania entered January 8, 2001, which denied allowance of appeal from equity proceedings in the Pennsylvania state courts.[1] In those proceedings, the trial court entered a default judgment in favor of the Borough.[2] Rather than petitioning to open the default judgment as required by state court rules and precedent, Barrett chose to take an appeal to the Commonwealth Court of Pennsylvania, an intermediate

[1] Barrett has incorrectly stated his appeal to be from the Commonwealth Court of Pennsylvania, which is an intermediate state appellate court.

[2] The default judgment was entered as the Amended Final Decree dated January 24, 2001, and is attached to Barrett's Petition as Appendix C.

appellate court in the state judicial system. The Commonwealth Court affirmed the trial court's Order and Barrett was unsuccessful in obtaining review by the state's highest court, the Supreme Court of Pennsylvania.

The genesis of the Borough's equity complaint was Barrett's years of refusal to bring his properties into compliance with the Borough's BOCA Property Maintenance Code ("Code") and Historic District regulations. The complaint averred that, commencing in 1992, the Borough cited Barrett on a continuous basis for well over one hundred and seventy (170) Code violations. Barrett had also unsuccessfully challenged the procedural and substantive validity of the regulations in the Historic District Ordinance. *See Barrett v. Borough of Carlisle*, 707 A.2d 250 (Pa. Commw. 1998), *petition for allowance of appeal denied*, 555 Pa. 714, 724 A.2d 350 (1998).[3]

In pre-trial discovery, the Borough served Barrett with interrogatories and requests for production of documents. (*See* Petitioner's Appendix Parts K and L). On October 7, 1999, the trial court adjudicated Barrett in contempt for his failure to comply with its Order of June 3, 1999, directing him to answer the Borough's interrogatories and requests. (*See* Petitioner's Appendix Part G at G2, G3 and G4 and Respondent's Appendix Part 1). He was incarcerated, and when his defiance continued, he was eventually released under an order directing his

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[3] Barrett did not appeal directly to this Court, but filed a new suit in U.S. District Court in an effort to relitigate the same issues here presented. *See* U.S. Supreme Court Docket No. 00-977 and the matters filed therein.

compliance under penalty of the entry of a default judgment. (*See* Respondent's Appendix Part 2). Barrett still did not comply and the trial court, after hearings, entered the judgment in the form of the Amended Final Decree.

ARGUMENT

Rule 10 of the Rules of the Supreme Court of the United States indicates, in pertinent part, as follows:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> . . .
>
> (c) a state court . . . has decided an important question of federal law that has not been, but should be settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

As an initial consideration, the Borough submits that Barrett's Petition is replete with inaccurate averments of fact not appearing of record in the proceedings below. Further, he miscategorizes this case as one premised under the umbrella of 42 U.S.C. § 1983. It is not. It is a case brought in equity by a municipality seeking compliance by a stubborn and recalcitrant owner with its property maintenance code and historic district regulations. Nevertheless, the Borough presents the following reasons why this Court should not grant Certiorari.

This Court should deny the Petition for Certiorari because the petitioner again attempts to raise previously litigated procedural and substantive issues relating to the Carlisle Borough Historic District which are barred under *res judicata*.

Barrett's petition asserts that this Court should review his claims that the Borough's historic district regulations are both procedurally invalid and substantively unlawful. Previously, he unsuccessfully litigated these identical issues through the Pennsylvania judicial system. *See Barrett v. Borough of Carlisle*, 707 A.2d 250 (Pa. Commw. 1998), *petition for allowance of appeal denied*, 555 Pa. 714, 724 A.2d 350 (1998). He did not take a direct appeal by filing a Petition for Writ of Certiorari with this Court from the denial of his appeal by the Supreme Court of Pennsylvania. Instead, he chose to relitigate the issues by starting over in the United States District Court. (*See* Petition for Writ of Certiorari filed in this Court at No. 00-977, and specifically, Petitioner's Appendix Parts D and F and Brief in Opposition Appendix Part 1 filed therein). Under the authority cited by the United States District Court, those issues were barred by *res judicata*. Pennsylvania and federal law are consistent on this long established doctrine of judicial economy. Barrett's petition presents no compelling reason why this Court should grant further review.

Notwithstanding the bar of *res judicata*, the Supreme Court of Pennsylvania has consistently and repeatedly recognized this Court's decision in *Penn Central Transportation Company v. New York City*, 438 U.S. 104, 57 L. Ed.2d 631 (1978). *See United Artists' Theater Circuit, Inc. v. City of*

Philadelphia, 535 Pa. 370, 635 A.2d 612 (1993); *Pittsburgh v. Weinberg*, 544 Pa. 286, 676 A.2d 207 (1996); and *Park Home v. City of Williamsport*, 545 Pa. 94, 680 A.2d 835 (1996). It is well-settled in Pennsylvania that the historic designation of property without the owner's consent does not amount to a taking under the Fifth and Fourteenth Amendments to the United States Constitution, but is rather a restriction on the owner's use of that property.

Moreover, this case involves considerably more than historic district regulation. It is about a recalcitrant owner who refuses to make basic repairs to his properties in order to bring them into compliance with the nationally recognized BOCA Property Maintenance Code, as adopted locally by the Borough. Barrett has made no assertion that the application of that Code violates any federal law or constitutional protection.

This Court should deny the Petition for Certiorari where the Petitioner complains of the trial court's entry of a default judgment against him as a sanction for his failure to provide discovery under state civil procedural rules, because no Fourth Amendment question is presented.

By his own doing, Barrett suffered the penalty of a default judgment imposed by the trial judge as a sanction for his stubborn refusal to provide answers to certain interrogatories and produce certain documents authorized by state discovery rules. The sanction was not imposed as a result of any failure to allow property inspections as misstated in his Petition. The Pennsylvania Rules of Civil Procedure are substantially similar to the Federal Rules of Civil Procedure and the civil procedural

rules of most states in permitting pre-trial discovery of information via written interrogatories and requests for production of documents.[4]

Barrett has not cited any authority for his absurd proposition that civil pre-trial discovery by interrogatories and document production requests amounts to an unlawful Fourth Amendment "search" in contravention of the United States Constitution. Such a blanket prohibition would essentially eliminate pre-trial discovery in all courts in our nation. While certain materials that would lead to self-incrimination and criminal prosecution are constitutionally protected from civil discovery, Barrett has not related, nor preserved for appeal, any such nexus in this case. None exists in fact, and no federal or constitutional issue is presented.

This Court should deny the Petition for Certiorari where the state trial court enters a default judgment providing appellee equitable relief in the form of the appointment of a manager to bring petitioner's properties into property code and historic district compliance while he retains ownership and joint possession, where the record fails to establish a Fifth Amendment taking, and where he intentionally forfeits his right to present evidence of such claim at trial.

Preliminarily, the Borough submits that Barrett has made unsubstantiated factual averments in this and other portions of his Petition which were never proven by him at trial or any hearing. In fact, his egregious conduct was

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[4] See Pennsylvania Rules of Civil Procedure No. 4001, *et seq.*, and Federal Rules of Civil Procedure No. 26, *et seq.*

the sole reason there was no trial. Further, Barrett cites no authority, either state or federal, for his proposition that the appointment of a manager to bring a recalcitrant landowner's properties into compliance with a property maintenance code, without more, is tantamount to a Fifth Amendment taking without just compensation.

This is not a case of the permanent taking of private property for a public access easement as in *Nollan v. California Coastal Commission*, 483 U.S. 825, 97 L. Ed.2d 677 (1987) or *Dolan v. City Of Tigard*, 512 U.S. 374, 129 L. Ed.2d 304 (1994). Nor does it meet the test established by this Court in *Penn Central, supra.*, and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 120 L. Ed.2d 798 (1992). To constitute a taking, this test requires a showing that the regulations and/or the decree do not substantially advance legitimate state interests or that an owner is denied all economically beneficial or productive use of land. This Court has recognized that this occurs only in extraordinary circumstances. The record in this case does not support a finding of a taking, and by denying appellate review, the Supreme Court of Pennsylvania so recognized.

The record is clear that Barrett was unwilling to bring his properties into compliance with the Borough's property maintenance code. He was put on notice as to what would be the result of his continued disregard of the trial court's order and had ample opportunity to comply. The order compelling written and document discovery is not an unconstitutional "search."

Just as importantly, a careful review of the Amended Final Decree indicates that Barrett retains ownership and

joint possession of his properties. His tenants were not to be disturbed of peaceful possession of their units. He is given the opportunity, with approval of the trial court and upon securing the necessary permits, to perform the required repairs or cause them to be performed on his behalf.

The powers granted to the agent in the Amended Final Decree do not rise to the status of an equitable receiver with outright power to sell his properties. Notwithstanding, as this is an equity case, outright receivership could have been considered. Both federal and state law recognize the long-standing remedy of receivership and no court has found it to be, without more, a taking in the constitutional sense. On the facts of this case, there is no constitutional issue presented or preserved for review by this Court. Moreover, the record does not substantiate that an unlawful taking of property has occurred.

CONCLUSION

Barrett has presented no compelling reason why this Court should grant a Writ of Certiorari in this state equity case. He has presented no important question of federal law or divergence of judicial opinion which would justify

review. In light of the foregoing, Respondent Borough of Carlisle prays that this Honorable Court will deny Barrett's Petition for Writ of Certiorari.

Respectfully submitted,

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Date: February 21, 2001

APPENDIX 1

BOROUGH OF CARLISLE, Plaintiff,	:	IN THE COURT OF COMMON PLEAS OF CUMBERLAND COUNTY, PENNSYLVANIA 98-4145 EQUITY
V.	:	
ROBERT H. BARRETT Defendant	:	

ORDER OF COURT

AND NOW, this 7th day of October, 1999, pursuant to Pennsylvania Rule of Civil Procedure 4019(c) (4), I adjudicate you in civil contempt for failing to comply with the order of June 3, 1999.

You may purge yourself of contempt by complying with the order by 1:15 p.m. on Wednesday, October 13, 1999. You are ordered to appear in Courtroom Number 2, Cumberland County Courthouse, Carlisle, Pennsylvania at 1:15 p.m., Wednesday, October 13, 1999, to determine if you have complied with this order. If you have not complied, you will be committed to the Cumberland County Prison at that time until you purge yourself of contempt.

At that hearing the Borough of Carlisle shall produce evidence of its counsel fees for obtaining this order of compliance, including its counsel fees incurred in obtaining the order of compliance dated June 3, 1999. Counsel fees will be awarded and as part of defendant's conditions of purge of this order of civil contempt. He shall be then ordered to pay such counsel fees in full, not later than December 1, 1999.

This order will not be stayed unless a supersedeas is issued by a higher court of this Commonwealth.

By the Court,

/s/ Edgar B. Bayley
Edgar B. Baylery J.

Edward L. Schorpp, Esquire
For the Plaintiff

Robert H. Barrett, Pro Se

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APPENDIX 2

BOROUGH OF CARLISLE,	:	IN THE COURT OF
PLAINTIFF	:	COMMON PLEAS OF
	:	CUMBERLAND
V.	:	COUNTY,
ROBERT H. BARRETT,	:	PENNSYLVANIA
	:	
DEFENDANT	:	98-4145 EQUITY
	:	TERM
	:	

IN RE: SANCTIONS FOR FAILURE TO COMPLY WITH AN ORDER DIRECTING DISCOVERY BEFORE BAYLEY, J. OPINION AND ORDER OF COURT

Bayley, J., November ___, 1999: –

On **July 22, 1998**, plaintiff, the Borough of Carlisle, filed this complaint in equity against defendant Robert H. Barrett. Alleging that Barrett is the owner of eleven properties, eight improved, in the historic district of the Borough of Carlisle, the Borough sought the following equitable relief:

> A. **That an agent be appointed to manage Barrett's eleven properties within the historic district in order to bring the properties into compliance with the code and historic district regulations; and**
>
> B. Than an injunction issue against Barrett prohibiting him from performing any repairs or alterations to any of his properties without first receiving certificates of appropriateness and building permits for such work; and

C. That the Borough be awarded its reasonable attorneys fees in this action, and all previous actions, between the parties; and

D. Such other equitable relief as the Court deems appropriate under the circumstances. (Emphasis added.)

The genesis of this longstanding dispute between plaintiff and defendant is defendant's refusal to comply with the provisions of the Carlisle Historic District ordinance in bringing his property into compliance with the Borough's BOCA Code. Defendant has unsuccessfully challenged the regulations set forth in the Historic District ordinance, **Barrett v Borough of Carlisle**, 707 A.2 250 (Pa. Commw. 1998), petition for allowance of appeal denied 555 Pa. 714 (1998).

Plaintiff has averred in its complaint, **inter alia**, that (1) defendant was found guilty of code violations in 1993, (2) he was found guilty of code violations in 1994, which judgment was affirmed by the Commonwealth Court of Pennsylvania,[1] (3) one of his properties was condemned by the Borough in December, 1994, which was affirmed in this court with his appeal to the Commonwealth Court being dismissed,[2] (4) he was found guilty of code violations in 1995, (5) on October 5, 1995 and September 9, 1996, he was found in contempt of the condemnation order, (6) on February 14, 1996, he was found guilty of code violations, (7) on July 24, 1997, he was found guilty of twenty code violations, and (8) on May 15, 1998, he

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[1] 655 A.2d 678 (Pa. Commw. 1995).

[2] ___ Pa. Commw. ___ (208, 209 C.D. 1995, March 31, 1995).

was found guilty of one hundred and fifty-eight code violations.

In its complaint, the Borough avers that Barrett is an absentee owner and has undertaken a coordinated plan to blight the Borough's Historic District. It avers that Barrett has continued to refuse to repair and maintain the properties he owns in the Historic District, and to comply with the Borough's ordinances, and that he has vowed not to comply with the ordinances because he refuses to recognize their validity and applicability to his properties. The Borough avers that it believes that Barrett's buildings can be salvaged and restored to comply with the BOCA Code and Historic District regulations without causing undue economic hardship. It further avers that Barrett intends to allow his properties to fall into such disrepair that no economic value will remain in them so that demolition can be affected, thus having a deleterious effect on the surrounding properties in the Historic District. The Borough concludes by averring that "The statutory and administrative remedies available to the Borough have been inadequate to insure enforcement of its code and historic district regulations."

Barrett filed preliminary objections to the complaint which were dismissed on **February 9, 1999**. The court concluded that plaintiff, pursuant to the **Borough of Kennet Square v. Lal**, 165 Pa. commw. 573 (1994), had stated a complaint upon which relief could be granted. Defendant filed an answer to the complaint on **December 22, 1998**.

On **January 8, 1999**, defendant filed a notice of removal to the United States District Court for the Middle

District of Pennsylvania. Plaintiff filed a motion to remand which was granted by an order of the District Court dated **March 18, 1999**. On **April 29, 1999**, plaintiff filed a motion to allow issuance of a subpoena to the Pennsylvania Historical and Museum Commission. That motion was denied on **April 23, 1999**. On **May 11, 1999**, defendant filed a second notice of removal to the United States District Court for the Middle District of Pennsylvania. Plaintiff filed a motion for remand and on **May 13, 1999**, the District Court remanded the case to this court and further ordered its Clerk of Court to refuse to accept for filing any further notices of removal of the case.

The Borough of Carlisle sought discovery in the form of answers to interrogatories, the production of documents, and the inspection of the eight improved properties subject to this dispute. Defendant refused to allow the inspection of the properties and failed to comply with much of the discovery requested. On **June 3, 1999**, following a hearing on plaintiff's motion to compel compliance with its request for discovery, the following order was entered:

I. OBJECTIONS OF DEFENDANT TO PLAINTIFF'S INTERROGATORIES

1. Interrogatory No. 1. The objection **IS SUSTAINED** because the information sought is not relevant.

2. Interrogatory No. 2. The objection **IS SUSTAINED** except that defendant shall state his annual salary and any other income for the years 1996, 1997, 1998 and 1999 to date.

3. Interrogatory No. 5. The objection **IS OVERRULED**. Defendant shall answer this interrogatory in its entirety.

4. Interrogatory No. 7. Because defendant has identified only himself as an expert who will be called to testify, and he has answered the interrogatory with respect to himself, the objection **IS SUSTAINED**.

5. Interrogatory No. 10. The objection **IS SUSTAINED** because the information sought is not relevant.

6. Interrogatory No. 14. The objection **IS OVERRULED**. Defendant shall answer this interrogatory in its entirety.

7. Interrogatory No. 16. The objection **IS OVERRULED**. Defendant shall answer this interrogatory in its entirety.

8. Interrogatory No. 15. The objection **IS SUSTAINED** as the information sought is not relevant.

9. Interrogatory No. 17. The objection **IS SUSTAINED** as the information sought is not relevant.

10. All interrogatories that defendant is ordered to answer as set forth above shall be answered within twenty (20) days of this date.

II. PLAINTIFF'S MOTION TO COMPEL DEFENDANT TO COMPLY WITH PLAINTIFF'S REQUEST FOR PRODUCTION OF DOCUMENTS

1. Request No. 2. **IS DISMISSED** as overbroad.

2. Request No. 6. The motion **IS GRANTED.** Defendant shall provide plaintiff with such documents.

3. Request No. 7. The motion **IS GRANTED.** Defendant shall provide plaintiff with such documents.

4. Request No. 8. **IS DISMISSED** as not relevant.

5. Request No. 9. **IS DISMISSED** as defendant was issued any such permits by plaintiff who has knowledge of them.

6. Request No. 10. **IS DISMISSED** as overbroad.

7. Request No. 11. The motion **IS GRANTED.** Defendant shall provide such documents to plaintiff.

8. All documents that defendant is ordered to produce as set forth above shall be produced within twenty (20) days of this date.

III. REQUEST FOR INSPECTION OF IMPROVED PROPERTIES OF DEFENDANT AT 25 NORTH BEDFORD STREET, 35 SOUTH BEDFORD STREET, 37 SOUTH BEDFORD STREET, 122 EAST LIBERTY AVENUE, 134 EAST HIGH STREET, 136 EAST HIGH STREET, 138 EAST HIGH STREET AND 29 SOUTH EAST STREET

1. The request for the inspection of the aforesaid improved properties, which is opposed by defendant, **IS GRANTED.**

2. A group of up to six people may enter said properties, those people being one borough representative, the borough solicitor, a photographer who may be a borough representative, a real estate appraiser, a structural engineer and a contractor.

3. The entry of each property shall be for the purpose of inspecting, measuring, photographing, videotaping, testing, sampling, or analyzing the said properties and all fixtures and for code violations.

4. Each inspection may last for up to three hours.

5. The inspection schedule shall be as follows:

a. The inspection of 25 North Bedford Street shall commence at 9:00 a.m., Monday, June 21, 1999.

b. The inspection of 35 South Bedford Street shall commence at 1:00 p.m., Monday, June 21, 1999.

c. The inspection of 37 South Bedford Street shall commence at 9:00 a.m., Tuesday, June 22, 1999.

d. The inspection of 122 East Liberty Avenue shall commence at 1:00 p.m., Tuesday, June 22, 1999.

e. The inspection of 134 East High Street shall commence at 9:00 a.m., Wednesday, June 23, 1999.

f. The inspection of 136 East High Street shall commence at 1:00 p.m., Wednesday, June 23, 1999.

g. The inspection of 138 East High Street shall commence at 9:00 a.m., Thursday, June 24, 1999.

h. The inspection of 29 South East Street shall commence at 1:00 p.m., Thursday, June 24, 1999.

6. Defendant shall provide complete access to these properties by the inspectors and shall not interfere with said inspections.

7. This inspection schedule may only be altered upon agreement of *both* parties for their convenience. (Footnote omitted.)

Defendant filed a petition to vacate the discovery order of June 3, 1999. On **June 17, 1999**, an order was entered that "[t]he petition to vacate the discovery order dated June 3, 1999, is denied." On **June 21, 1999**, defendant filed an interlocutory appeal to the Commonwealth Court of Pennsylvania from the order of June 3, 1999. The appeal was docketed in the commonwealth Court at No. 1662 C.D. 1999. On **June 23, 1999**, this court filed an opinion in support of the order of June 3, 1999. On **June 28, 1999**, defendant filed a second interlocutory appeal to the Commonwealth Court of Pennsylvania from the order of June 17, 1999, that denied his petition to vacate the discovery order issued on June 3, 1999. That appeal was docketed in the Commonwealth Court at No. 1662 C.D. 1999. On **July 19, 1999**, the Commonwealth Court at 1661 and 1662 C.D. 1999, quashed defendant's appeals as interlocutory.

Plaintiff filed a motion to hold defendant in civil contempt for failing to comply with the inspection schedule set forth in the order of June 3, 1999. Following

hearings, on **July 7, 1999**, the following order was entered:

> [I] adjudicate you in civil contempt of court for violating this Court's inspection order of June 3, 1999. You are committed to the Cumberland County Prison until you purge yourself of contempt. You may purge yourself of contempt by advising me at any time that you will comply with the inspections as required by the order of June 3, 1999, and at that point I will then immediately set a new inspection schedule, and I will then have a sheriff take you to the first scheduled inspection, and if you comply with that inspection order, you may remain out of prison for as long as you continue to purge yourself of contempt by allowing all further inspections as scheduled. Defendant is to stand committed in civil contempt until the conditions of purge are met or he obtains a supersedeas from an Appellate Court.

After defendant spent forty-one days in prison in defiance of the order to allow plaintiff to inspect his properties, he was released on **August 17, 1999**, on the following order:

> [d]efendant, Robert H. Barrett, having advised this court by letter received this date that he 'agrees to comply with the inspections as required by the Order of June 03, 1999,' a copy of which is attached hereto, and upon relation that the Carlisle Borough Solicitor is out of town until August 23, 1999, and that the gathering of the six people authorized by the order of June 3, 1999, to make said inspections cannot be quickly assembled, it is ORDERED:

1. The Carlisle Borough Solicitor shall provide this court with dates during which the inspections of the eight properties as provided for in the order of June 3, 1999, can be conducted at the rate of two inspections a day, one in the morning and one in the afternoon.

2. Following receipt of said dates an additional order will be entered scheduling the inspections at which time defendant will be held in compliance pursuant to the order of June 3, 1999, and his current agreement in writing that he will now comply with the inspections.

3. Defendant is temporarily released from commitment under this court's order of July 7, 1999, adjudicating him in civil contempt for violating the inspection order of June 3, 1999, conditioned upon his compliance with the new scheduling order to be entered.

On **August 23, 1999**, a new inspection schedule was ordered with the first inspection to commence at 9:00 a.m., Monday, **August 30, 1999**. Defendant appeared in court on **August 30, 1999**, with a motion to prohibit the inspections until plaintiff posted a bond to cover any injuries that might occur while its representatives were on his properties. The motion was denied and the inspections scheduled for that day and all subsequent dates per the order of August 23, 1999, were conducted.

Defendant, however, continued to refuse to comply with that part of the discovery order of June 3, 1999, requiring him to answer interrogatories and produce certain documents. Plaintiff filed a petition to hold him in civil contempt. Following hearings, on **October 7, 1999**, the following order was entered:

> [p]ursuant to Pennsylvania Rule of Civil Procedure 4019(c)(4), I adjudicate you in civil contempt for failing to comply with the order of June 3, 1999.
>
> You may purge yourself of contempt by complying with the order by 1:15 p.m. on Wednesday, October 13, 1999. You are ordered to appear in Courtroom Number 2, Cumberland County Courthouse, Carlisle, Pennsylvania at 1:15 p.m., Wednesday, October 13, 1999, to determine if you have complied with this order. If you have not complied, you will be committed to the Cumberland County Prison at that time until you purge yourself of contempt.
>
> At that hearing the Borough of Carlisle shall produce evidence of its counsel fees for obtaining this order of compliance, including its counsel fees incurred in obtaining the order of compliance dated June 3, 1999. Counsel fees will be awarded as part of defendant's conditions of purge of this order of civil contempt. He shall be then ordered to pay such counsel fees in full, not later than December 1, 1999. . . .

Defendant did not comply with the order as directed by October 13, 1999, and has been incarcerated in the Cumberland County Prison since that date for failing to answer interrogatories and produce documents under the sanction imposed by this court pursuant to Pa. Rule of Civil Procedure 4019(c)(4).[3] Having previously spent forty-one days in prison until he complied with that part of the order of June 3, 1999, for the inspection of the

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[3] Defendant was also ordered to pay counsel fees to plaintiff in the amount of $981.

subject properties, and now going back to prison on October 13, 1999, for failure to comply with part of the same order directing him to answer interrogatories and produce documents, it is obvious that defendant's stubbornness is significantly delaying litigation of this case which was commenced on July 22, 1998. Pa. Rule of Civil Procedure 4019(c)(3), allows the following sanction for refusal to comply with a discovery order:

> [a]n order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, **or entering a judgment** of non pros or **by default against the disobedient party** or party advising the disobedience. (Emphasis added.)

In applying this sanction, the Superior Court of Pennsylvania stated in **Stewart v. Rossi**, 681 A.2d 214 (Pa. Super. 1996):

> We note initially that dismissal of a complaint as a discovery sanction is authorized under Pa.R.Civ.P. 4019. *Pride Contracting Inc. v. Biehn Construction, Inc.*, 381 Pa.Super. 155, 553 A.2d 82 (1989); *see also Lawrence v. General Medicine Ass'n, Ltd.*, 412 Pa.Super. 163, 602 A.2d 1360 (1992) (judgment of non pros entered against plaintiff for violation for discovery rules); *Miller Oral Surgery, Inc. v. Dinello*, 416 Pa.Super. 310, 611 A.2d 232 (1992) (default judgment entered against defendant for discovery violation). Furthermore, the sanction to be imposed for a discovery violation is left to the sound discretion of the trial court. *Miller Oral Surgery, Inc. v. Dinello, supra*. However, **since dismissal is the most severe sanction, it should be imposed only in extreme circumstances, and a trial court is**

> **required to balance the equities carefully and dismiss only where the violation of the discovery rules is willful and the opposing party has been prejudiced.** *Pride Contracting, Inc. v. Biehn Construction, Inc., supra.*
>
> **Under these cases, the following factors are to be weighed: the nature and severity of the discovery violation, the defaulting party's willfulness or bad faith, prejudice to the opposing party, the ability to cure prejudice, and the importance of the precluded evidence in light of the failure to comply.** (Emphasis added.)

The most severe sanction as allowed under Pa. Rule of Civil Procedure 4019(c)(3) has been upheld for the failure to comply with a court order directing discovery. **Pride Contracting, Inc. v. Biehn Construction, Inc.**, 381 Pa. Super. 155 (1989).

Since the discovery order was entered following a hearing to compel on June 3, 1999, requiring defendant to answer certain interrogatories and produce certain documents, the nature and severity of this conduct has been egregious. He has completely failed to comply with the order for no legitimate reason. That failure has been willful, in bad faith, and has continued despite defendant's imprisonment for civil contempt since October 13, 1999. Defendant's bad faith is further evidenced by his filing two interlocutory appeals in the Commonwealth Court and two frivolous notices of removal to the United

States District Court. As to the importance of the discovery sought in light of defendant's failure to comply with the order to compel, the interrogatories in question are:[4]

(1) Defendant was directed to answer part of Interrogatory No. 2 by stating his annual salary and any other income for the years 1996, 1997, 1998 and 1999 to date. This information is important for plaintiff to meet any defense that defendant might raise with respect to any prior or current financial inability to bring his properties into compliance with the Borough's codes.

(2) Defendant was required to answer Interrogatory No. 5 which asked "Give the carrier name, policy number, and policy limits for each and every policy insuring each of the parcels of real estate owned by you in the borough of Carlisle; also state the nature of coverages under each." Plaintiff is seeking an order that an agent be appointed to manage Barrett's properties and to bring those properties into compliance with the BOCA Code and Historic District regulations. Knowledge as to the status of insurance coverage on each property is important as it relates to any relief that may be warranted.

(3) Defendant was directed to answer Interrogatory No. 14 which asked:

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[4] The order to compel only required defendant to answer some of plaintiff's interrogatories. Defendant's objections to the interrogatories were sustained as to Interrogatory 1, part of Interrogatory No. 2, and Interrogatories 7, 10, 16, and 17.

For each parcel of real estate situate in the Borough of Carlisle in which you have an ownership interest, state:

(A) whether such parcel is vacant or improved with a structure or structures and identify the type(s) of structure;

(B) the deed reference of your deed;

(C) the date of acquisition;

(D) the purchase price;

(E) whether or not it is encumbered by debt and identify the creditor, current unpaid balance owing, required monthly payment and record reference;

(F) whether the structure is occupied and by whom, and if not, the last date it was occupied during the ownership and by whom;

(G) the reason the structure is not occupied;

(H) the total sum you have spent for maintenance, repair, improvement or betterment, or demolition of such property since the date of your purchase; and

(I) if you removed, or caused to be removed, any structure on the parcel, state when the structure(s) were removed and the reason for removal.

Given the nature of the relief sought, all of this information goes to matters which would be expected to be raised in the trial and for which plaintiff should be properly prepared.

(4) Defendant was directed to answer Interrogatory No. 15 which asked:

> For each property identified in the foregoing Interrogatory, state the following:
>
> (A) identify any work you performed on each property in the nature of maintenance, repairs, improvements, betterment or demolition;
>
> (B) for each work identified in the preceding subsection, state whether or not you applied for any building permits to perform such work; and
>
> (C) for each work identified in the preceding subsection, whether or not you obtained any building permits to perform such work.

This information goes directly to the central issue regarding the case which is defendant's alleged long continued failure to comply with the Borough's codes.

With regard to the order to produce documents, the documents in question are:[5]

(1) Defendant was ordered in Request No. 6 to produce "All written rental records, inclusive of income and expense statements for each of the properties owned by Defendant in the Borough of Carlisle." With respect to any relief that may be warranted it is essential to plaintiff to know the full rental status of each property.

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[5] The order to compel only required defendant to produce some of the documents sought by plaintiff. Defendant's objections to the request for documents were sustained as to requests No. 2, 8, 9 and 10.

(2) Defendant was ordered in Request No. 7 to produce "All records reflecting all income, of any nature whatsoever, and all expenses related to each of the properties owned by you in the Borough of Carlisle during your period of ownership." This information properly supplements information regarding defendant's financial status to meet any issue regarding defendant's past or current financial ability to comply with the Borough's codes.

(3) Defendant was ordered in Request No. 11 to produce "Copies of the declaration pages of each policy of insurance applicable to each parcel of real estate owned by you in the Borough of Carlisle." This information properly supplements and verifies the required information regarding insurance in Interrogatory No. 5.

For the aforesaid reasons we find that the importance of the precluded evidence is considerable in light of defendant's failure to comply with the discovery order. In **Stewart v. Rossi, supra,** the Superior Court of Pennsylvania stated that prejudice for the purposes of a discovery violation is said to result any time there is a substantial diminution of a party's ability to properly present its case. We find that there is a substantial diminution in plaintiff's ability to properly present its case. The operative term here is "properly present its case."

The imprisonment of defendant for civil contempt has not altered his stubborn refusal to continue his delaying tactics in bringing this case to trial. Balancing the equities we are satisfied that unless defendant forthwith complies with the discovery order his conduct calls for the imposition of the most severe sanction of default

under Rule 4019(c)(3). At this juncture, neither notice nor an additional hearing is a necessary prerequisite to the imposition of this sanction. **Pride Contracting, Inc. v. Biehn Construction, Inc., supra**. Accordingly the following order is entered.

ORDER OF COURT

AND NOW, this 22nd day of November, 1999, **IT IS ORDERED:**

(1) If defendant fails to respond completely to the interrogatories and production of documents required by this court's order of June 3, 1999, not later than Wednesday, December 1, 1999, the following relief will be ordered:

(a) a default judgment will be entered in favor of plaintiff and against defendant;

(b) an agent will be appointed to manage defendant's eleven properties within the Historic District of the Borough of Carlisle in order to bring those properties into compliance with the Code and Historic District regulations;

(c) an injunction will be issued prohibiting defendant from performing any repairs or alterations to any of his properties without first receiving certificates of appropriateness and building permits for such work;

(d) the Borough will be awarded reasonable attorney fees in this action;

(e) a further hearing will be conducted for the issuance of additional equitable relief necessary to effectuate the aforesaid provisions.

(2) Defendant is released from his commitment to the Cumberland County Prison pursuant to the orders of October 7 and 13, 1999.

By the Court,

/s/ Edgar B. Bayley
Edgar B. Bayley, J.

Edward Schorpp, Esquire
for Plaintiff

Robert Barrett, Pro se
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Cumberland County Prison
Carlisle, PA 17013